No. ~~88948-7~~ 89948-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR GRESH,

Petitioner,

v.

OKANOGAN COUNTY AND MAZAMA PROPERTIES LLC,

Respondents.

MAZAMA PROPERTIES LLC'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case centers on a property dispute between two neighbors in Okanogan County. Every governmental entity and court to consider the case—five so far, including most recently Division III of the Court of Appeals in an unpublished decision—has held for respondent Mazama Properties LLC. The case does not merit Supreme Court Review.

The principal issue presented is whether RCW 90.44.050, which requires a permit for groundwater wells and provides four exemptions, requires a permit when a landowner substitutes one exempt use for another. The answer is no, based on the plain text, case law, and considered opinion of the Department of Ecology. There is also no evidence on the frequency with which the issue arises. This case therefore does not present an issue of substantial public interest that should be decided by this Court. Even if it did, this case is not an appropriate vehicle to decide that issue because petitioner's claim is time-barred by the Land Use Petition Act, as the Court of Appeals held. Petitioner seeks to collaterally attack a settled land use decision by challenging a later and admittedly inconsequential decision, which he may not do. This Court would thus be precluded from deciding the primary issue presented. Finally, while the attorney fees issue presents a split of authority in the

Courts of Appeal, this Court has already granted review and is currently deciding that issue in another case, so review here is unnecessary.

II. COUNTER STATEMENT OF THE ISSUES PRESENTED

1. Whether the exempt well statute (RCW 90.44.050)—which provides four exemptions from obtaining a permit for a well—allows a landowner to substitute one exempt use for another without obtaining a permit.

2. Whether the Land Use Petition Act's 21-day deadline for land use challenges (RCW 36.70C.040) bars a lawsuit ostensibly challenging one land use decision but really challenging a decision made months earlier.

3. Whether RCW 4.84.370—which entitles a prevailing party to attorney fees when forced to defend more than two failed appeals of a land use decision—applies when such appeals failed because a party's claims are time-barred.

III. COUNTER STATEMENT OF THE CASE

A. The Land and Its Initial Development.

At the intersection of Lost River Road and Goat Creek Road, near the Methow River in unincorporated Okanogan County, lies ten acres of

land. (E-2 at 2.[1]) In 2007, Okanogan County was asked to approve a plat (a map showing the division of a parcel into lots) envisioning development of that land. (CP 263-64.) Before approving that or any plat, Okanogan County must find that it has adequate potable water. Okanogan County Code 16.12.040(B)(4). The Okanogan County Health District must also certify that the proposal is served by an adequate water supply. *Id.*

For its water supply, the plat proposed a well. (CP 265.) Under state law, a well requires a permit from the State Department of Ecology ("Ecology"), with four exceptions, two of which are "single or group domestic uses in an amount not exceeding five thousand gallons a day," and "an industrial purpose in an amount not exceeding five thousand gallons a day." RCW 90.44.050 (the "exempt well statute").

The development here envisioned single domestic use limited to 5,000 gallons per day. (CP 265.) Those gallons were allotted to the plat's four lots, based roughly on each lot's size. (*See* CP 268-72.) Restrictive covenants were recorded to make sure that each lot would not use more than its share. (*Id.*) Finding the plat's water source acceptable, Okanogan County approved the plat in June of 2007. (CP 263-64.)

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[1] The Clerk's Papers, where marked, are cited as "CP." The County's administrative appeal record is not so marked, but is contained in the Court's File in a folder with tabs E1 through E17. Documents in that folder are cited by tab and, where applicable, relevant page number or attachment.

B. Mazama's Proposed Division.

A few years later, respondent Mazama bought one of the four lots. (*See* E-2 attach. F.) Mazama then sought to divide its lot into twelve lots, six residential and six commercial. (E-2 at 1.) Mazama proposed to limit the twelve lots to a combined total of 2,880 gallons of water per day—the amount Mazama's lot was allotted when the original plat was approved. (E-2 attachs. E & O.)

The permitting process also required the County, under the State Environmental Protection Act ("SEPA"), to determine if the proposed division would have "a probable, significant adverse environmental impact." RCW 43.21C.031. If it so found, an Environmental Impact Statement would be required. *Id.* If not, the County would issue a Determination of Nonsignificance ("DNS") or a Mitigated Determination of Nonsignificance ("MDNS"), and no Environmental Impact Statement would be required. *See id.* In July of 2010, the County issued an MDNS, finding no such impact if water use were limited to 2,880 gallons per day and either the County or State Health Department approved the proposed water system. (E-2 attach. K.) Just over two months later the Okanogan County Board of Commissioners, following a favorable report from County staff, granted preliminary approval to the proposed division with the limitations suggested. (E-4 at 1; E-2 attach. O.)

C. There Was No Misrepresentation.

Meanwhile, Mazama had been working to obtain the State Department of Health's approval for its water system. Mazama applied to that Department for its water system approval in July of 2010. (E-4 attach. C.) The Department asked for more information, including the exact amount of the 2,880 gallons per day each lot would be allowed to use. Mazama recorded an agreement defining the amount per lot. (CP 226, 252-53.) The Department, after receiving the recorded agreement, approved the water system. (E-4 attach. C; CP 222, 250.)

Gresh alleges that a letter in which the Department of Health asked Mazama for more information somehow shows that the County's decisions were "obtained by misrepresentation" (Pet. for Review ("Pet.") at 3) or "procured by demonstrably false testimony" (*id.* at 5, 8). The allegation is somewhat confusing, and in any event is incorrect. Gresh quotes a portion of the letter written during the Department of Health's review, which says the Department "had not received any comments from Department of Ecology regarding your water rights" and based its "review on your assurances that adequate water rights are secured by the system to cover all existing and proposed uses." (CP 252-53.)

Gresh does not say what about those statements is false or a misrepresentation. It appears he may contend they are false because, in

his view, the exempt well statute does not allow the 2,880 gallons per day to be divided between the proposed new lots. But that is not misrepresentation; it is a statement of the law (and as discussed in Section IV.A., *infra*, a correct statement).

Alternatively, Gresh seems to suggest that the statement shows the Department of Health merely relied on Mazama's say-so. That is inaccurate, however, because the quoted letter was sent in the middle of the Department's review process. (CP 252-53.) The Department did not approve the system until nearly two months later, after it independently confirmed that the water system was compliant. (E-4 attach. C.) Far from relying on Mazama's word, the Department investigated and concluded on its own that the well was acceptable.

Gresh also accuses Mazama of "fail[ing] to keep promises" because, after telling the Department that food service would be prohibited, it advertised that the land was zoned for several types of business, including restaurants. (Pet. at 9.) That was a true statement. The land *was* zoned for restaurants. Some restaurants may not have been able to abide by the gallons-per-day limitation, but that does not make the advertising false. And if a high-water business sought to use one of the lots, the County had the continuing obligation to ensure it would abide by

the limit, as "any project permitted by the new zone would be reviewed at the time of issuance of a building permit." (E-16 attach. A.)

D. The County's Final Approval.

On March 14, 2011, the Okanagan County Board of Commissioners gave final approval to Mazama's proposed division. (E-3.) By doing so, it found that the proposed division was served by adequate water under the exempt well statute and that the water system was approved by the State Department of Health. (*See id.*) Those decisions form the central dispute in this case. Yet neither Gresh nor anyone else appealed them.

E. The Proposed Rezone.

A week after the County's final approval, Mazama applied to rezone six of the twelve lots from "urban residential" use to "neighborhood" use. (E-17 attach. A.) Both allow commercial uses, but given the water restrictions, the change would give Mazama more flexibility to select small retail stores that would not require much water. (E-17 Attach. C.) Pursuant to SEPA, the County issued a DNS. (E-6.) It did so based on an independent investigation, (*see id.*), even though by regulation it could merely have adopted the findings from its earlier approval, WAC 197-11-600(4), -630. Gresh's claim (Pet. at 9) that the

County "summarily issued a DNS for the rezone" because it "had just determined that the long plat had no adverse impacts" is thus incorrect.

Additionally—and crucially—Gresh conceded that the County's rezone finding and DNS were correct. In his own words to this Court, "there was (and is) no dispute that the Nordic Village's water impacts are the same under either zoning classification." (Br. of Pet'r, No. 87127-2, at 11 (Wash. July 20, 2012).) Gresh nevertheless appealed the approval of the rezone. (E-7.) He alleged that the earlier property division would leave the property without adequate water—an issue Gresh long knew about and which the County had decided months earlier. (*See id.*)

His appeals, each of them unsuccessful, have now lasted for over three years. First the County Director of Planning denied his administrative appeal. (CP 92.) Then the County Board of Commissioners denied his appeal, after which it gave final approval to the rezone. (E-15, E-16.) Then the Okanogan County Superior Court, hearing his challenge under the Land Use Petition Act ("LUPA"), denied his appeal. (CP 40.) Then he sought direct review before this Court, which rejected his petition. Then Division III of the Court of Appeals denied his appeal in an unpublished decision, holding that it was untimely under LUPA and awarding Mazama attorney fees. (Pet., app. A.) He now asks this Court to accept discretionary review.

IV. ARGUMENT

The central issue on which Gresh seeks review is whether the exempt well statute allows landowners to substitute one exempt use for another without obtaining a permit. Review should be denied because that issue is not of substantial public importance requiring determination by this Court. RAP 13.4(b)(4). Although this Court has not squarely held that the exempt well statute allows substitution of one use for another, the answer is clear. And this Court would not be able to decide the issue in any event, because this case is time-barred. Finally, while the attorney fees issue may be worthy of review, this Court has already granted review on that issue in another case, so there is no need to do so again here.

A. The Exempt Well Issue Does Not Merit this Court's Review Because the Answer is Straightforward.

As Gresh observes (Pet. at 1), when moving to file an amicus brief at the Court of Appeals, Ecology suggested the exempt well statute presented an important issue of law. (Amicus Curiae Br., No. 313948, at 3 (Wn. Ct. App. (July 26, 2013).) Mazama disagrees; this case merely involves a property dispute between neighbors and there is no evidence on the number of disputes involving the exempt well statute. Nevertheless, the answer to the question presented is straightforward. Gresh's novel interpretation of the statute finds no basis in the text or case law, and Ecology rejects it. There is therefore no need for Supreme Court review.

1. The Exempt Well Statute.

The exempt well statute reads in relevant part:

> [N]o withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public groundwaters . . . for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section . . . .

RCW 90.44.050. "In effect, the statute prohibits withdrawal of public groundwaters until the Department grants a permit to do so and then sets forth a number of exceptions to this general rule." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 306, 268 P.3d 892 (2011).

The principal issue on which Gresh seeks review is whether one exemption can be substituted for another. According to Gresh, because the well here was originally drilled with the intention of a single domestic use of less than 5,000 gallons per day, it cannot without a permit be used for group domestic or industrial use of less than 5,000 gallons per day.

That interpretation finds no place in the text of the statute, which merely provides that wells require permits, with four exemptions. Nor can the interpretation be squared with *Kim v. Pollution Control Hearings Board*, 115 Wn. App. 157, 61 P.3d 1211 (2003). In that case, a house was served by a well drilled in 1965. *Id.* at 158, 61 P.3d at 1211. The

appellants bought it in 1990 and began using, without a permit, the well's water for both their house and a commercial nursery. *Id.* When Ecology determined a permit was required for the nursery water, a lawsuit followed. Eventually Division II of the Court of Appeals held that no permit was necessary because the nursery water was used for an industrial purpose and less than 5,000 gallons were used per day. *Id.* at 162-63, 61 P.3d at 1213-34. If Gresh's interpretation were correct, *Kim* would have reached the opposite result because a permit would have been required when the landowners began using water for their nursery in addition to using it for their house.

Ecology also disagrees with Gresh's interpretation, and because Ecology is tasked with administering the exempt well statute, its views are entitled to "considerable weight." *Weyerhaeuser Co. v. State Dep't of Ecology*, 86 Wn.2d 310, 315, 545 P.2d 5 (1976) (citation omitted). Before the Court of Appeals, Ecology filed an amicus brief explaining that "when a well is used to supply water for one permit-exempt purpose of water use, a permit is not required to use the well supply water for another permit-exempt use." (Dep't of Ecology's Amicus Curiae Br., No. 313948, at 14 (July 26, 2013).) A contrary holding, Ecology said, would be "nonsensical." (*Id.* at 17.)

Gresh incorrectly claims that Ecology and the Attorney General's Office have changed their position on the exempt well statute. He contrasts Ecology's amicus brief with a 1997 Attorney General's Opinion, (Pet. at 2), but the 1997 opinion involved a different issue. It addressed a hypothetical landowner who "wishes to subdivide a tract of land for multiple-unit residential development." Op. Att'y Gen. 6 (1997). The hypothetical "property owner plans to drill several wells." *Id.* "Each of the wells individually is expected to pump less than 5000 gallons of water per day, but the total pumped by all the wells will exceed 5000 gallons per day." *Id.* The opinion concluded that their output must be combined for the purposes of the exempt well statute. *Id.*

Gresh cites a section of the opinion deciding whether a right granted by the exempt well statute can "be transferred to a different place and/or a different use pursuant to RCW 90.03.380." *Id.* RCW 90.03.380—which provides that water rights remain appurtenant to the land where they are used but can be transferred to other places or uses in certain circumstances—is not at issue here. Mazama does not seek to transfer the place of its water rights. The 1997 opinion, in other words, dealt with a different fact pattern and a different statute than those presented here. Neither the Attorney General nor Ecology has changed its views.

2. Gresh Relies on Inapposite Cases.

Gresh principally relies on *State Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002). That case involved a developer who sought to drill a different well for each lot in a subdivision. *Id.* at 3, 43 P.3d at 7. Each well would withdraw less than 5,000 gallons per day, but if combined they would withdraw more. *Id.* This Court held that when a developer is planning a subdivision, the wells must be combined for the purposes of the exempt well statute. *Id.* at 14, 43 P.3d at 21.

Gresh misreads *Campbell & Gwinn*. He argues that it "limit[s] use of an exempt well to the single exempt purpose claimed when it was drilled." (Pet. at 13.) He does so by plucking out of context this sentence: "The developer may not claim multiple exemptions for the homeowners." *Campbell & Gwinn*, 146 Wn.2d at 11, 43 P.3d at 14. That sentence was part of a discussion about whether each lot could have its own 5,000 gallons per day because each lot would eventually have a separate owner. *Id.* at 11, 43 P.3d at 14. This Court rejected that claim because the developer, not the future homeowners, planned to drill the wells. "[I]t is the developer, not the homeowner, who is seeking the exemption in order to drill wells on the subdivision's lots and provide for group domestic uses

in excess of 5,000 gpd. The developer may not claim multiple exemptions for the homeowners." *Id.*

Campbell & Gwinn, in other words, is simply off point. It did not consider whether the exempt use at the time of drilling could be substituted by a different exempt use. It held only that a subdivision's water use is treated as the sum of the uses of its lots. The water use for Mazama's development is limited to 2,880 gallons per day, its allotment of the 5,000 gallons allotted to the initial development.

Gresh's use of *Five Corners* also misses the mark. That case involved a company in need of water to run a large cattle feedlot. 173 Wn.2d at 300, 268 P.3d 896. One of the four exemptions in the exempt well statute is "for stock-watering purposes." RCW 90.44.050. That exemption is not immediately followed in the statute by a 5,000 gallon-per-day limit. *Id.* The issue presented was whether the stock-watering exemption was limited to 5,000 gallons per day. *Five Corners*, 173 Wn.2d at 302, 268 P.3d 898. The Court held it was not. *Id.* at 300, 269 P.3d at 896. It did so because each of the four exceptions is separated in the statute by the word "or," meaning that those with gallons-per-day limits are subject to those limits, and those without such limits are not. *Five Corners* did not address, let alone decide, whether one exempt use may be substituted for another.

In sum, the issue presented is not of substantial public interest that should be decided by this Court.

B. This Lawsuit is Time-Barred in Any Event.

Even if this Court believed that the exempt well statute was of substantial public interest, this is not the case in which to address it. Gresh's appeal is untimely and therefore barred, as the Court of Appeals concluded. This Court therefore would not be able to reach the exempt well statute even if review were granted.

LUPA was enacted in 1995 "to provide consistent, predictable, and timely judicial review" of land use decisions. RCW 36.70C.010. It did so by "establishing uniform, expedited appeal procedures." *Id.* One such procedure is a strict time bar. "A land use petition is barred, and the court may not grant review, unless the petition is timely filed . . . within twenty-one days of the issuance of the land use decision." RCW 36.70C.040(2), (3). In an unbroken line of cases, this Court has applied the bar as written to preclude untimely land use challenges. *Cedar River Water & Sewer Dist. v. King County*, 178 Wn.2d 763, 786, 315 P.3d 1065 (2013); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407-10, 120 P.3d 56 (2005); *Samuel's Furniture, Inc. v. State Dep't of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2003); *Chelan County v. Nykreim*, 146 Wn.2d 904, 933, 52

P.3d 1 (2002); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000).

This Court has applied the time bar strictly because finality in land use decisions is important. "Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner." *Chelan County*, 146 Wn.2d at 933, 52 P.3d at 15.

This Court has also consistently rejected collateral attacks on settled land use decisions in challenges to later-issued decisions. *Habitat Watch*, 155 Wn.2d at 410-11, 120 P.3d at 63 ("Because appeal of the special use permit and its extensions are time barred under LUPA, [plaintiff] cannot collaterally attack them through its challenge to the [later-issued] grading permit."); *Wenatchee Sportsmen*, 141 Wn.2d at 181, 4 P.3d at 129 (holding that a plaintiff could not use a plat approval challenge to attack a previously issued rezoning decision); *cf. Samuel's Furniture*, 147 Wn.2d at 463, 54 P.3d at 1206 (when Ecology failed to timely challenge a county's decision, "it cannot collaterally challenge the local government's determination . . . by bringing independent enforcement actions against the property owner or developer").

Wenatchee Sportsmen is directly on point. The county there rezoned a piece of property, a decision that was not appealed. 141 Wn.2d at 174, 4 P.3d at 125. A short while later the landowner applied for approval of a plat, which the county granted. *Id.* The plaintiff challenged the latter decision, but its principal argument was that the former decision was incorrect. *See id.* at 175, 4 P.3d at 125. This Court rejected that claim as untimely. The former issue "should have been raised in a timely LUPA challenge to the *rezone*, not in the later challenge to the plat." *Id.* at 181, 4 P.3d at 129 (emphasis in original).

In precisely the same way here, Gresh collaterally attacks a settled decision based on a later-issued decision. His true challenge is to the determination that dividing Mazama's lot into twelve lots would nonetheless leave it with adequate legal water. (*See* Pet. at 11.) Yet he raises that issue by challenging the later-issued rezoning approval. (*See id.* ("Once the [earlier] MDNS for the long plat is withdrawn, the [later] rezone DNS cannot stand"). Under *Wenatchee Sportsmen* and *Habitat Watch*, he may not do so. His claim is thus time-barred.

Gresh makes three arguments in response. First, he argues that two regulations allow parties to challenge land use decisions at any time as long as there are claims of "significant, new information" or "misrepresentation." (Pet. at 16.) As Mazama explained in Section III.C.,

supra, there was no misrepresentation or new information. Moreover, Gresh merely infers the conclusion that there is no time limit from the absence of a specific time limit in the regulations. (Pet. at 16.) A more appropriate inference—given that regulations must be read in harmony with statutes, *ITT Rayonier v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993)—is that LUPA's time limit applies to the regulations. LUPA is (with exceptions not relevant here) "the exclusive means of judicial review of land use decisions," RCW 36.70C.030(1), and under LUPA "even illegal decisions must be challenged in a timely, appropriate manner." *Habitat Watch*, 155 Wn.2d at 407, 120 P.3d at 61. The regulations thus do not extend the time for land use appeals.

Second, Gresh argues that the county's rezone decision "relied entirely upon the long plat's MDNS [the decision dividing Mazama's lot into twelve lots] to demonstrate its lack of impacts." (Pet. at 11.) Not so. While the County could have relied on its earlier decision, it chose instead to independently assess the proposed rezone. (E-6.) Moreover, if the County had relied on the earlier decision, Gresh still would not be able to challenge it now for precisely the same reason the plaintiff in *Wenatchee Sportsmen* was unable to do so: "[i]f there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be

given effect, and the [settled decision] is no longer reviewable." 141 Wn.2d at 182, 4 P.3d at 129.

Third, Gresh observes (Pet. at 17) that the *Wenatchee Sportsmen* Court, after dismissing the challenge to the earlier decision as time-barred, remanded the challenge to the later decision for further consideration. The difference is that the plaintiff there actually claimed the later decision itself presented environmental impacts, independent of the earlier decision. *See Wenatchee Sportsmen*, 141 Wn.2d at 181, 4 P.3d at 129. In contrast, Gresh conceded that under the later-issued rezoning, "there was (and is) no dispute that the . . . water impacts are the same under either zoning classification." (Br. of Pet'r, No. 87127-2, at 14 (Wash. July 20, 2012).)

Gresh's appeal is thus time-barred, as the Court of Appeals held. This Court would therefore be unable to reach the central issue on which Gresh seeks review, rendering discretionary review inappropriate.

C. Mazama is Entitled to its Fees.

Gresh's final issue for review—whether Mazama is entitled to its attorney fees—indeed involves a split of authority among the Courts of Appeal. However, this Court has already granted review to address the split. *See Durland v. San Juan County*, 179 Wn.2d 1001, 315 P.3d 530 (2013). There is therefore no need to grant review in this case as well.

This case demonstrates the need for a fee award in these situations. Under RCW 4.84.370(1), "reasonable attorneys' fees and costs shall be awarded to the prevailing party . . . on appeal before the court of appeals or the supreme court of a decision by a county . . . to issue . . . a development permit . . . if . . . [t]he prevailing party on appeal was the prevailing . . . party before the county . . . and . . . [t]he prevailing party on appeal was the prevailing party . . . in all prior judicial proceedings." In other words, parties are entitled to attorney fees if a county's "decision is rendered in their favor and at least two courts affirm that decision." *Habitat Watch*, 155 Wn.2d at 413, 120 P.3d at 64.

Here, Gresh has now filed multiple appeals, each of them unsuccessful. He has effectively obtained a three-year appellate stay—and delayed Mazama's legal development for three building seasons—without having to post a supersedeas bond. The use of litigation to thwart land use decisions is precisely the reason the attorney fees provision in RCW 4.84.370 was enacted.[2]

V. CONCLUSION

The Court of Appeals' unpublished decision applied settled law to straightforward facts and concluded that Gresh's challenge is barred by LUPA. There is no need for this Court to review the decision below.

[2] Pursuant to RAP 18.1(j), Mazama also requests its reasonable fees incurred in answering Gresh's Petition for Review.

DATED: March 31, 2014

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CERTIFICATE OF SERVICE

I, KAREN RENTZ, certify that on this 31st day of March, 2014, I caused to be served a true and correct copy of Mazama Properties LLC'S Answer to Petition for Review to the Counsel as indicated below:

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Signed this 31st day of March, 2014, in Seattle, Washington

Karen Rentz, Legal Secretary

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Subject: RE: No. 88948-7 Arthur Gresh v. Okanogan County and Mazama Properties

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Subject: No. 88948-7 Arthur Gresh v. Okanogan County and Mazama Properties

Re: No. 88948-7 Arthur Gresh v. Okanogan County and Mazama Properties

Dear Clerk of the Court,

Please find attached "Mazama Properties LLC's Answer to Petition for Review" as a PDF document for filing today in the above-captioned matter.

Please let me know if you have any difficulty opening this document. Thank you kindly for your assistance in filing this.

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